

FINAL STATEMENT OF REASONS:

The California Department of Corrections and Rehabilitation (CDCR) proposes to adopt and amend Title 15, Sections 3006, 3187, 3188, 3189, and 3331, of the California Code of Regulations (CCR), pertaining to the expansion of the smoking free zone outside state buildings from 5 feet to 20 feet, and the prohibition on the use and possession of all tobacco products by inmates under the jurisdiction of the Department, as well as all staff and visitors to the Department facilities wherever inmates are present.

Assembly Bill (AB) 846 (Chapter 342, Statutes of 2003) changed existing provisions of the Government Code relating to smoking and tobacco control in public buildings and elsewhere. The provisions of this law particularly relevant to CDCR are those that expand the smoking free zone outside state buildings from 5 feet to 20 feet outside doors and windows and add new signage requirements for posting areas off limits to smoking.

In addition, AB 384 (Chapter 798, Statutes of 2004) prohibits the possession or use of tobacco products by inmates under Departmental jurisdiction effective July 1, 2005, with certain limited exceptions. Exceptions are permitted for Department approved inmate religious ceremonies. AB 384 further prohibits the use of tobacco products by non-inmates, including staff, visitors, and vendors/contractors, on the grounds of institutions and facilities of the Department, or where inmates under the jurisdiction of the Department are present. Exceptions are provided for residential staff housing when inmates are not present. Residential staff housing also includes such locations as, but is not limited to, the Academy, fire camps, and Bachelor Officer Quarters. Additionally, the Department is relying on its general rule making authority to extend the prohibition on the possession of tobacco products to include staff, visitors, and vendors/contractors, when they are on institution or facility grounds where inmates are present. The extension of this prohibition on possession of tobacco eases administration, in that all persons in institutions/facilities where inmates are present, or wherever inmates under the jurisdiction of the Department are present, must abide by the same rules governing use and possession of tobacco. This tobacco prohibition promotes a healthier workplace as well as carries a potential to reduce healthcare and disability costs to the Department by minimizing the exposure of inmates and staff to tobacco products at any location where inmates are present.

The CDCR has provided tobacco cessation information and is promoting cessation programs for both inmates and staff that conform to the security needs of the institutions. The prohibition on possession will also reduce the temptation and opportunity for staff, inmates, and visitors to the institutions to traffic in tobacco on institution/facility grounds, or where inmates are present, and in supplying contraband to inmates. The Department has made an accommodation for its staff, in that nicotine replacement products such as patches and lozenges are allowed in quantities for immediate, personal staff use. Meeting the legislative requirements, and the broadened prohibition on staff and visitor possession of tobacco, necessitates specific amendments in the Department's existing smoking regulations and other related regulations contained in Title 15 of the California Code of Regulations (CCR) concerning such matters, as outlined in detail below. In addition, other technical, non-substantive and conforming changes in the CCR improve clarity.

No specific technical, theoretical, or empirical study, report, or background document, was relied upon in proposing these regulatory changes. However, health care costs associated with tobacco use are well documented by the Center for Disease Control, the Heart and Lung Associations, the Surgeon General, and professionals in Public Health. In addition, private “at will” employers promote tobacco cessation and employee wellness programs to help reduce health care costs. Alternatives to the revisions and additions posed are not contemplated at this time.

The Department has determined that no reasonable alternatives to the regulations have been identified or brought to the attention of the Department that would lessen any adverse impact on small business.

The Department has determined that the facts, evidence, documents initially identified in the Initial Statement of Reasons support an initial determination that the action will not have a significant adverse economic impact on business. Additionally, there has been no testimony or other evidence provided that would alter the Department’s initial determination.

The Department did not make an initial determination in the Initial Statement of Reasons as to whether adoption, amendment, or repeal of the regulation imposes a mandate on local agencies or school districts. However, the Department has determined that this action imposes no mandates on local agencies or school districts, or a mandate, which requires reimbursement pursuant to Part 7 (Section 17561) of Division 4.

Subsections 3006(a) through 3006(17)2 remain unchanged.

Subsection 3006(c)(18) is adopted to specify that the possession or use of any tobacco product, or tobacco cessation product that contains nicotine, will be considered contraband as defined in section 3000, and may result in disciplinary action and confiscation of the contraband.

Section 3188 is renumbered 3187 to allow a new section to be added at the end of this article to address inmate violations and cessation assistance (discussed below).

Renumbered subsection 3187(a)(1) remains unchanged.

Renumbered subsection 3187(a)(2) is adopted to provide for a definition of “use”, which goes beyond just mere smoking of tobacco to include the use of any tobacco products under the tobacco ban.

Renumbered subsection 3187(a)(3) is amended to designate residential areas at institutions, correctional training academies, and conservation camps.

Former Subsection 3188(a)(3) is deleted because under the newly established provision of Penal Code (PC) 5030.1, inmates are no longer permitted to smoke on prison yards.

Renumbered 3187(a)(4) is amended for clarity with the deletion of repetitive wording, and the interjection of “conservation camps” to more accurately capture the substantive meaning of the text in question.

Renumbered subsection 3187(b) is amended in accordance with the new provisions of GC 7597, with the substitution of 20 feet for 5 feet as the allowable distance from building entrances and exits where smoking can occur. The term “operative window” must also be

added in order to preserve GC subsection 7597(a) consistency. Substitution of the phrase “state owned or state occupied building” for “the security perimeter of” more accurately reflects the restrictions that have been established with enactment of PC 5030.1.

Renumbered subsection 3187(b)(1) is amended to expand the definition of residential spaces of staff where smoking would be permitted, to include such facilities as Bachelor Officer Quarters at conservation camps.

Renumbered subsection 3187(b)(2) is amended to allow for the insertion of “approved inmate” to the exception of tobacco use during religious ceremonies, e.g. Native American religious ceremonies.

Renumbered subsection 3187(c) remains unchanged.

Renumbered subsection 3187(d) is deleted because it is now inconsistent with the provisions of PC 5030.1(b) in that staff also are banned from the use of tobacco on any institution or facility grounds, or wherever inmates under the jurisdiction of the Director are present.

Renumbered subsection 3187(e) is deleted as it is repetitive to subsection 3187(b)(2).

Subsections 3187(f) and (g) are renumbered 3187(d) and (e). The signage provisions of redesignated subsection (d) have been reworded so as to more accurately reflect the requirements of GC 7598, which permits smoking in outdoor areas of public buildings unless otherwise legally prohibited and a sign describing the prohibition is posted.

Renumbered subsection 3187(e) remains unchanged.

Section 3189 is renumbered 3188 to allow a new section to be added to the end of Article 8 to address inmate violations and cessation assistance (discussed below).

Renumbered subsection 3188 (a)(1) remains unchanged.

Renumbered subsection 3188(a)(2) is amended to expand the definition of what constitutes a “tobacco product”. The addition of tobacco substitutes, smoking paraphernalia, and ancillary items including packaging material, close loopholes in the definition that might be exploited by those hoping to thwart the intent of the legislature in imposing the tobacco ban.

Renumbered subsection 3188(b) remains unchanged.

Renumbered subsection 3188(c) is amended to implement the specific requirements of PC section 5030.1 such that the word “inmate” is now replaced with “person”, as the Legislature and the Department have expanded smoking prohibitions to cover visitors, contractors/vendors, and employees, as well as inmates. In fact, the wording of this subsection very specifically clarifies that staff shall not use or possess tobacco products in the presence of inmates. Addition of the words “or use” and replacement of existing phraseology respecting the “optional” application of smoking prohibitions are also necessitated by the wording of new law, which makes such prohibitions universal to “any institution or facility”, or where any inmate under CDCR jurisdiction is present. Finally, the one exception noted in this subsection that allows tobacco products in departmentally approved inmate religious

ceremonies has been removed, as it is now one of four tobacco ban exceptions as noted below.

Subsection 3188(c)(1) is adopted to reflect that the use of tobacco products in departmentally approved inmate religious ceremonies is now one of four exceptions to the tobacco ban.

Subsection 3188(c)(2) is adopted under the Director's PC 5058(a) authority to prescribe rules for the administration of prisons. The securing of otherwise prohibited or disallowed items (such as clothing, personal, and non-work related possessions) in one's locked vehicle while parked on institutional grounds is a time honored practice in the CDCR commonly applied to visitor and employee alike. Therefore, so long as the tobacco product is intended for personal use off grounds and remains inaccessible while on CDCR grounds, this further exemption appears statutorily justifiable.

Subsection 3188(c)(3) is adopted in accordance with the exemptions specified by the Legislature to reflect that tobacco products for personal use are permitted in residential spaces of staff where inmates are not present. Clarification of the use of tobacco products in the residential areas of the Department Academy, in fire camps, and in BOQ's is provided, noting that tobacco use will be permitted only in designated areas and at designated times.

Subsection 3188(c)(4) is adopted to clarify that tobacco cessation products are permitted for use by staff, and for immediate use only.

Subsection 3188(d) is adopted as it is necessitated by the enactment, effective July 1, 2005, of PC 5030.1, prohibiting inmate "possession and use" of tobacco products, as well as for staff and visitors for the reasons noted above. Inmates are: (1) Entitled notice of this prohibition in the rules and regulations they are required to follow while incarcerated; and (2) Need to be advised that as of the effective date, possession and use of tobacco products as defined, will be considered contraband under Title 15, CCR 3006. Public notice of the rule prior to the legal effective date is intended to allow affected inmates, if they choose, greater opportunity to prepare for when the total ban will be imposed by gradually tapering off smoking, as most cessation experts recommend. Under the provisions of section 3006, possession of contraband permits confiscation of the prohibited item and imposition of disciplinary action. Therefore, the addition of 3188(d) is critical to enforcement of the statutory ban.

Section 3189 regarding Inmate Violations and Cessation Assistance is adopted. As previously explained, room has been made for the addition of this particular section within Article 8 with the renumbering of existing sections 3188 and 3189. This particular rule informs inmates that imposition of the disciplinary sanctions set forth elsewhere in the applicable CCR shall be the consequence of violating the prohibitions of the immediately preceding two sections. In addition, to assist inmates and staff in ending tobacco dependency, the Department may provide a variety of cessation classes and printed informational material.

Section 3331 is amended to conform to the tobacco ban on inmates. Specifically, 3331(c)(2) must be revised to reflect the tobacco ban. The last two sentences of this subsection are deleted to reflect that any possession or use of tobacco products by an inmate in any institution or facility, even when under disciplinary detention, is banned under AB 384.

ASSESSMENTS, MANDATES, AND FISCAL IMPACT:

This action will neither create nor eliminate jobs in the State of California nor result in the elimination of existing businesses or create or expand business in the state of California.

The Department has determined this action imposes no mandates on local agencies or school districts, and no fiscal effect on federal funding to the state, or private persons. It has been determined there will no fiscal impact or savings on state or local government. It has also been determined that this action does not affect small businesses nor have a significant adverse economic impact on business, including the ability of California businesses to compete with businesses in other states, because they are not affected by the internal management of state prisons; or on housing costs; and no costs or reimbursements to any local agency or school district within the meaning of Government Code Section 17561.

DETERMINATION:

The Department has determined that no alternative considered would be more effective in carrying out the purpose of this action or would be as effective and less burdensome to affected persons than the action proposed.

PUBLIC COMMENTS:

Public Hearing: Held October 6, 2005, at 9:00 a.m.

SUMMARIES AND RESPONSES TO ORAL COMMENTS AT THE PUBLIC HEARING

There were three attendees at the Public Hearing, although no attendees elected to present oral comments.

SUMMARIES AND RESPONSES TO WRITTEN COMMENTS:

COMMENTER #1:

Comment A: Commenter states that smoking provides a benefit to inmates with all the pressures of prison life, and to just take tobacco out of the prison setting without providing some tangible cessation product is cruel. The Department should provide patches or gum or some kind of cessation product to keep inmates from being irritable or even violent without the tobacco.

Accommodation: None.

Response A: The Department offers a variety of Tobacco Cessation Educational Programs for the inmate population. All Reception Centers offer tobacco cessation educational materials through the Bridging Program. Tobacco Cessation educational materials are also available through the academic instructors, recreation coaches, and re-entry instructors. In fact, many of these programs were in place months before the ban went into effect July 1, 2005. The Mental Health Programs also offer stress and anger management counseling for the inmate population. They can be referred by staff or self-refer. Flyers and posters have been disseminated to health care staff to equip them in addressing nicotine withdrawal issues. Posters have been provided to all institutions and have been posted to make inmates and their visitors aware of the Inmate Health Care Inquiry Hotline. This can be used to anonymously

inform health care staff of any issues regarding an inmate's health or any health care issues/needs.

COMMENTS #2:

Comment A: Staff will be allowed to use personal tobacco cessation products such as patches, inhalers, or lozenges, but inmates will not be allowed to use them. This is an unfair treatment because nothing is being provided to inmates who will be suffering major sickness withdrawals.

Accommodation: None.

Response A: The Department recognizes that withdrawal from nicotine addiction is difficult. The Department contends that for those inmates that may suffer from withdrawals, there are stress management and anger management classes available through the Mental Health Departments at each institution. Inmates have the ability to self-refer to the Mental Health Program. Correctional staff can also refer inmates to the Mental Health Departments. The health care staff are equipped to address clinical needs resulting from any potential withdrawals. Mental Health staff have been alerted to be more aware of any increased agitation and irritability. Patient information flyers have been distributed to each institution/facility that informs the inmate population about the affects of quitting smoking. It also provides them with the positive benefits of not smoking and steps that can be taken to decrease side effects of not smoking. All inmates in the Mental Health Services Delivery System are being monitored per Departmental policies regardless of their smoking history.

Comment B: Commenter stated that prison guards will now be tempted to bring in cigarettes as contraband and sell them for a highly inflated price. Nothing can be done to stop that.

Accommodation: None.

Response B: Custody staff are carefully selected, and background and psychological reviews are completed, prior to comprehensive training at an academy that includes such subjects as what constitutes contraband and what the ramifications would be of introducing contraband into an institutional setting. In fact, all correctional staff are trained on a regular basis on a variety of subjects, including what constitutes contraband. While it is unrealistic to anticipate that at no time would any correctional staff engage in the introduction of any form of contraband into the correctional setting, all staff are aware that the consequence of such action could range from loss of pay to loss of job, to even having charges brought against them. Additionally, the correctional setting is quite unique in that the inmate population often does not respect staff that are inclined to break the rules as it compromises the safety and security of the institution for all. Inmates will commonly advise supervisory staff when such rule breaking occurs.

Comment C: Commenter stated it is not clear who and how prison officials will determine what constitutes religious purposes where smoking would be allowed.

Accommodation: None.

Response C: Assembly Bill (AB) 384 provides for a specific exemption from the tobacco ban for departmentally approved religious ceremonies. Institutional management consisting of both religious chaplains and designated custody supervisors have been and continue to be

responsible for reviewing any request for the use of tobacco in religious ceremonies. This requirement has not changed with the implementation of AB 384. The precise means as to how or when tobacco can be used in a religious ceremony will vary from institution to institution, and even from ceremony to ceremony.

Comment D: Commenter questions what will happen to visitors who have tobacco in their car, as well as why they can't be allowed to smoke in their cars on institution/facility grounds.

Accommodation: None.

Response D: There are no restrictions on the retention of tobacco products in the car of a staff person or a visitor in the parking lot of a prison, provided the car is locked and the tobacco products are not in sight. Under no circumstance, however, are staff or visitors allowed to bring tobacco products onto prison grounds, visiting areas, or onto any other area where inmates are present. Once staff or visitors enter the prison property, including the parking lot, the use of any tobacco product is strictly forbidden. Smoking in a vehicle, even in a prison parking lot, is forbidden as there are times when inmate work crews may be present.

Comment E: Commenter stated that an inmate should be allowed to make their own choice of whether or not to smoke. There is no reason why two smoking inmates shouldn't be allowed to smoke in the same cell.

Accommodation: None.

Response E: The Department's tobacco prohibition policies are consistent with Assembly Bill 384, which does not make the use of tobacco products optional. AB 384 restricts the use of tobacco products by all inmates under the Department's jurisdiction.

COMMENTER #3:

Comment A: Commenter stated that it is not fair to take tobacco products out of the prison setting. Tobacco has always been a part of prison life. It's the government's fault that people at a young age get hooked on tobacco, so the government should not be allowed to take tobacco away from inmates.

Accommodation: None.

Response A: Assembly Bill 384, prohibiting tobacco products, was authored and approved by the Legislature and signed by the Governor (elected officials) that represent the People of California. As elected officials it is their responsibility to act on behalf of the people. Citizens of the State have avenues to address laws that they do not agree with. The California Department of Corrections and Rehabilitation applied the Assembly Bill as directed by its language.

The Department asserts that cigarette smoking has been linked to a variety of adverse health problems such as heart attacks, strokes, lung cancer, emphysema, and chronic bronchitis. For many years smoking has been recognized as being the leading preventable cause of disease and death in our society. The health impact of smoking and secondhand smoke are of particular concern in the correctional setting. While the prevalence of smokers in the general population is around 20%, the prevalence among incarcerated persons in the U.S. is significantly higher; some studies report it as high as 80%. While it may not be possible to

judge the precise health impacts of cigarette smoking in prisons and jails, heart disease and lung cancer are among the leading causes of death for long term inmates. The health care costs of these diseases are borne by the Department, and ultimately by the taxpayers of California. The effects of secondhand smoke on nonsmoking inmates and correctional staff have not been studied, but exposure is suspected to be substantial. In many correctional facilities, exposure to secondhand smoke may be increased by the combination of the high prevalence of smokers, close quarters, and older buildings with aging ventilation. As such, the potential for adverse health effects among non-smokers appears to be great.

COMMENTS #4:

Comment A: Commenter states that this legislation banning tobacco products was generated without respect for the psychological effect of such action. Inmates that are experiencing serious signs of withdrawal problems are not being treated by or assigned to a psychologist. The desire of an inmate to possess or use tobacco is a personal choice that cannot be controlled by a law.

Accommodation: None.

Response A: See Commenter #2, Response A. In addition, increasing numbers of private and public sector employers have banned smoking in the workplace, recognizing the health benefits. Inmates who wish to reenter the workforce upon release from prison will face increasing restrictions on smoking and tobacco use both at work and elsewhere.

Comment B: Commenter states that the banning of tobacco products is largely based on the merits of a cost savings as related to health care, but it does not appear that savings of health care costs is sufficient justification to warrant taking away tobacco products from the prison setting.

Accommodation: None.

Response B: The cost avoidance to health care associated with the prohibition of tobacco products was one of several factors considered when the author(s) of Assembly Bill 384 crafted the legislation. There are other tangible and intangible benefits. The California Department of Corrections and Rehabilitation developed its policy in response to the Assembly Bill.

Comment C: Commenter states that this ban is discriminatory because inmates in other state penitentiaries do not suffer from such a tobacco ban.

Accommodation: None.

Response C: This ban on tobacco use and possession is not discriminatory. As of November of this year, at least 24 states have tobacco free prisons and most of the remaining states have partial bans, as does the Federal prison system. In recent years awareness of the health impacts of smoking has increased. Resolutions and statements in support of the implementation of no-smoking policies in correctional facilities were adopted in 1990 by the American Jail Association and the American Correctional Association and in 1993 by the American Correctional Health Services Administration. Law suits brought by non-smoking inmates against state and federal prison officials to obtain separate living areas have provided an additional impetus for change. Continuous exposure to high levels of secondhand smoke

was successfully argued to be cruel and unusual punishment under the Eighth Amendment. Inmates seeking protection of the right to smoke in the courts have had little or no success.

In the late 1990's, the California Department of Corrections began to mirror the California local and county jail's ban on tobacco usage by eliminating tobacco usage at all state prison reception centers. Most states in the country have adopted some form of a ban on tobacco usage, either in part or totally. In August, 2004, the California state Senate and Assembly passed Assembly Bill 384 banning the possession and use of all tobacco products in the correctional setting wherever inmates are present. The Department's regulatory action adopts the language regarding the ban on tobacco as set forth in the Assembly Bill.

Comment D: Commenter states this tobacco ban will lead to an increase in the black marketing of tobacco in a prison setting.

Accommodation: None.

Response D: The Department asserts that AB 384 is very specific. The Department is required to enforce all California laws. This bill prohibits the possession or use of tobacco products by inmates and wards under the jurisdiction of the Department, and the use of tobacco products by staff and visitors. The Department recognized the potential for tobacco to be problematic as a potential item of contraband, and extended the ban on possession of tobacco products to staff and visitors. Reader is also directed to **Commenter #2, Response B**.

Comment E: Commenter states that there have been a number of violent outbursts in California prisons since the tobacco ban was started, which are obviously related to the ban.

Accommodation: None.

Response E: The Department is not aware of an increase in violent outbursts in California prisons caused by the absence of tobacco since the implementation of the tobacco ban. The Department contends that any incidents that have occurred since July 1, 2005, the date the ban was implemented, are not beyond the norm for any previous time period. Additionally, the Department has been very proactive in developing and offering a variety of tobacco cessation programs designed to assist with the successful reduction in craving for tobacco products, and the stress related to tobacco cessation.

COMMENTER #5:

Comment A: Commenter states that the smoking ban discriminates against the disabled, as inmates with AIDS cannot join a fire camp where smoking is permitted.

Accommodation: None.

Response A: Assembly Bill 384 regarding the tobacco ban extends the ban to all inmates under the jurisdiction of the Department. As such, smoking is not permitted in fire camps.

Comment B: Commenter states that priority should be given to the correction or elimination of unconstitutional or illegal living conditions, such as abuse of prisoners, inedible food, medical malpractice, and leaky roofs. Smoking is not unconstitutional or an illegal activity.

Accommodation: None.

Response B: Commenter's statement does not directly address the proposed rules on tobacco use and possession. However, living conditions within the prison setting are constantly monitored by operational audits the Department regularly conducts of each of its facilities. In addition, aspects of the Department's operations are also examined by several court monitors. Any deficiencies are immediately brought to the attention of the facility, and an action plan to correct any deficiencies is developed and implemented. Additionally, inmates have the ability to bring any concerns regarding their living conditions to the attention of prison authorities via the appeal process, and if administrative remedies are exhausted can even seek remedial action through the courts. In this manner the Department is striving to ensure that the inmates constitutional rights, particularly with respect to the protection afforded under the Eighth Amendment of the Federal Constitution, with respect to cruel and unusual punishment, are not being violated.

As to the constitutionality of smoking, the Department notes that smoking is not mentioned in either the state or the federal Constitutions. Yet some people may claim that there is a fundamental right to smoke, an argument that fails because only certain "rights" are protected by the constitutions as fundamental, and smoking is not one of them. The U.S. Supreme Court has held that only personal rights that can be deemed fundamental are included in the guarantee of personal liberty, and those rights are associated with an individual's bodily privacy and autonomy within the home. Supporters of smoker's rights often claim that smoking falls under the fundamental right of privacy because it is a private act that government cannot invade. The Courts have consistently rejected this argument. A number of court cases stipulate that privacy interest protected by the Constitution includes only marriage, contraception, family relationships, and the rearing and education of children. Very few private acts by individuals qualify as fundamental privacy interests, and smoking is not included.

Another common constitutional claim made by supporters of smoker's rights is that laws regulating smokers discriminate against smokers as a specific group, and thus violate the equal protection clause of the Constitution. Yet no Court has upheld this claim. Equal protection clauses guarantee that the government will not treat similar groups of people differently without good reason. Groups of people based on race, national origin, and gender receive greater protection against discriminatory government acts under the Constitution than do other groups of people, and smokers have never been identified as a protected group. Generally the Courts require a protected group to have an immutable characteristic solely based on birth. Smoking is not an immutable characteristic because people are not born as smokers and smoking is a behavior that people can stop. Since smokers are not a protected group, laws that limit smoking are not capricious if related to a legitimate government purpose.

As long as a smoking regulation is rationally related to a legitimate government objective, such as protecting public health, the regulation will be upheld as constitutional.

Comment C: The loss to the State of tobacco tax revenue will far exceed any medical costs savings due to improved health care.

Accommodation: None.

Response C: The loss of tax revenue has not been determined at this time. The cost avoidance to the health care program as a result of the prohibition of tobacco products has not been determined at this time either. However, the Department is confident that health savings

from a tobacco free prison environment will be appreciable. The issue of revenue is only one of several factors to consider when attempting to improve inmate health. The State of California has an obligation to ensure the health and well-being of those felons under the jurisdiction of the Department of Corrections and Rehabilitation. Revenue increase or decrease is not the deciding factor.

Comment D: The dangers of creating a black market for tobacco in prison is another factor not added to the equation.

Accommodation: None.

Response D: See Commenter #4, Response D.

COMMENTER #6:

Comment A: Commenter states that the intent of the law is to reduce health care costs for inmates that are related to smoking, which is a good cause. But the taking of tobacco products from staff in fact places staff in a comparable category with an inmate. Inmates commit crimes so they can lose the personal choice of smoking. This ban should not be extended to those who do follow the law, just because they are staff. Smoking is a personal choice, and law abiding staff should be allowed to smoke.

Accommodation: None.

Response A: A ban on tobacco in California's prisons is not a punishment. It is the intent of the Department to follow the law, which in this case is Assembly Bill 384, introduced in the California State Assembly by Tim Leslie, passed by both houses of the Legislature, and signed by the Governor with an effective date of July 1, 2005. The bill contained an unambiguous ban on tobacco use by Department staff at institutions and facilities where inmates are present. There was no discussion in the development of this law to the Department's knowledge where correctional staff were in any way perceived to be in a comparable category with inmates. Rather, the intent of the Legislature was to completely ban the use of tobacco products from the state prison system entirely, effectively removing the product from use by inmates to accomplish the goal of improving inmate health, reducing health care costs to taxpayers, and reducing the temptation to staff of introducing contraband to inmates. Staff are not prohibited from personal use of tobacco products on their own time, away from the institutional setting.

The Department has actually been moving in the direction of a tobacco ban for some time. In the late 1990's a tobacco ban was instituted in most of this state's county jail facilities, and in the Department's reception centers. This ban was extended several years later to include 6 of the Department's institutions. In fact, as of November of this year, at least 24 states have tobacco free prisons and most of the remaining states have partial bans, as does the Federal prison system.

As to personal choice and the right to smoke, reader is directed to **Commenter #5, Response B.**

Comment B: There is a disparity of staff treatment in that staff at correctional facilities such as Headquarters are allowed to smoke because there are no inmates present.

Accommodation: None.

Response B: The Department acknowledges that there is in fact a disparity of treatment in the tobacco ban in that staff at Headquarters offices are still allowed to smoke with certain restrictions while at work. However, the tobacco ban that the Department has implemented at all of its institutions and facilities statewide where inmates are present is based on Assembly Bill 384. This Bill only addresses the subject of the use of tobacco products around inmates. At this time the Department's intent is to conform to the legislation.

Comment C: Having a designated smoking area for staff somewhere within the institution, which would not impact inmates, would make more sense and would be within the intent of the law.

Accommodation: None.

Response C: The Department disagrees. Assembly Bill 384 is very specific. This bill prohibits the possession and/or use of tobacco products by inmates and wards under the jurisdiction of the Department. This bill also specifically prohibits the use of tobacco products by any person "on the grounds" of any institution or facility under the jurisdiction of the Department. The intent of the law precludes any institution or facility, with few exceptions, from setting aside any designated smoking area for staff on grounds. Smoking would be allowed in staff housing when inmates are not present, and at approved Indian religious ceremonies. The Department has made every effort to accommodate staff and visitors who smoke, within the clear confines of the law.

COMMENTS #7:

Comment A: Commenter states that the smoking ban law's intent to reduce healthcare costs is good, but it is not right to place the same restrictions on law abiding staff that are being placed on inmates. Smoking is a personal choice.

Accommodation: None.

Response A: See Commenter #6, Response A.

Comment B: Commenter states that if during the course of working around inmates and no inmates are present within 30 yards of where a staff person is smoking, how can that be considered as not being within the intent of the law?

Accommodation: None.

Response B: See Commenter #6, Response C.

Comment C: Commenter states that the tobacco ban extends only to facilities where inmates under the jurisdiction of the Department. Therefore staff at Headquarters can smoke, which is not fair.

Accommodation: None.

Response B: The tobacco ban extends itself to any area or facility where inmates are present. Additionally, reader is directed to **Commenter #6, Response B.**

Comment D: Having a designated smoking area for staff would not impact inmates and would be within the intent of the law.

Accommodation: None.

Response D: See Commenter #6, Response C.

Comment E: The Department spends a lot of money doing elective surgeries for inmates. But why can't they now lower staff health care premiums if health care costs are going to be reduced?

Accommodation: None.

Response E: Healthcare premiums for staff are unrelated to any potential cost avoidance associated with inmates due to the tobacco prohibition. Employee premiums have to do with many other factors, including the health risks and cost of the population covered, such as Department employees. If the ban on tobacco in the institutions results in some staff successfully quitting tobacco, this may result on lower premiums for all employees. This would be a good outcome.

COMMENTER #8:

Comment A: Commenter states that working conditions for staff in the prisons are very dangerous. The Departments excessive use of its power to change rules at the whim of one person is a dictatorship, not a democracy. Because the ban extends to staff as well as inmates, staff feel they are being treated like inmates.

Accommodation: None.

Response A: The Department disagrees. Assembly Bill 384 was introduced by Assemblyman Tim Leslie; it was in fact approved by the California State Legislature and signed into law by the Governor. This is how our state's democratic form of government is intended to operate. Additionally, reader is directed to **Commenter #6, Comment A.**

Commenter #9:

Comment A: Commenter expressed concern that the Department once again filed something as an emergency regulation, some 10 months after the legislation was approved by the Governor. That is not accurate and is a violation of the law.

Accommodation: None.

Response A: The Department asserts that under its rulemaking authority it submitted these regulations under Emergency Operational Necessity in order to ensure that the Department could effectively and legitimately enforce the tobacco ban beginning July 1, 2005, the effective date of the legislation. Inmates, staff, and visitors to the Department's institutions, as well as the public, have a legitimate interest in knowing what the rules are when the enabling legislation becomes effective, particularly with regard to contraband, tobacco cessation programs, and inmate and staff expectations. Likewise, certain portions of the Title 15 that permitted cigarette and tobacco use needed to be immediately deleted and new rules put into temporary effect in order to avoid conflict and confusion with the new prohibition.

On June 17, 2005, the Chief Deputy Director of Field Operations, California Department of Corrections, certified that the operations needs of the Department required the emergency adoption of the proposed amendments to the California Code of Regulations, Title 15, Division

3, Sections 3006, and 3187 through 3189, pursuant to Penal Code Section 5058.3. This emergency rule making package, which included the Certification of Operational Necessity, was reviewed and approved by the Office of Administrative Law on June 17, 2005. The Certification of Operational Necessity requested approval of the proposed regulation revisions regarding a Tobacco Ban to conform to recently enacted legislation, Assembly Bill 384, (2004), that prohibits the possession or use of tobacco products by inmates under Department jurisdiction effective July 1, 2005. The prohibition against the use of tobacco products was extended by this legislation to include staff, visitors, and vendors/contractors on the grounds of institutions and facilities of the Department, or where inmates under the jurisdiction of the Department are present. Additionally, the Department relied on its general rule making authority under the Penal Code to extend the prohibition on the possession of tobacco products to include staff, visitors, and vendors/contractors when they are on institution or facility grounds or where inmates are present.

The Department acknowledges that the emergency regulations were filed 10 months after the legislation was approved by the Governor. By definition, a regulation is implemented to make specific a statute(s). Often statutes can not be implemented at face value; much coordination and planning was involved in implementing something as complex as a comprehensive tobacco ban, particularly in a state as large as California with an inmate population well in excess of 160,000. This Department has many interests involved in the appropriate implementation of this statute. Immediately after this legislation was implemented, the Department assembled a task force comprised of Executive Staff, Institutions Division, Health Care Services Division, Labor Relations, Legal Affairs Division, Financial Services Division, Health and Safety, and the Academy. The purpose of the task force was to develop a comprehensive plan by which to alert inmates and staff of the legislation and the time frame of implementation, to craft these regulations and supporting operational procedures, the development of cessation programs, the development of flyers and brochures advising inmates and staff of available programs, to institute contacts with community partners such as vendors/contractors and clinics. Since the legislation was all encompassing in that it extended beyond inmates to include staff, the Department also had to present the plan to its respective unions for their review. As such, the Department determined it was necessary to file the regulations on an emergency basis in order to ensure that the tobacco ban regulations could effectively and legitimately be enforced beginning July 1, 2005, the effective date of the legislation.

Comment B: Commenter states that the Department has missed a true opportunity for true rehabilitation by not having successful smoking cessation programs including nicotine replacement therapy. The Department has opted for a punitive approach implemented in the guise of an emergency to preclude real public input. The Department should mirror the cessation programs that have been implemented by the Federal prison system.

Accommodation: None.

Response B: See Commenter # 2, Response A, and Commenter #9, Response A.

Commenter #10:

Comment A: Commenter contends that the Departments proposed amendments do not adequately respond to the challenges posed by nicotine dependence and its implications for the health and safety of everyone in the prison system.

Accommodation: None.

Response A: See Commenter #1, Response A, and Commenter #2, Response A.

Comment B: Commenter states that this tobacco prohibition will result in the creation of a black market that often manifests itself in violence and other anti-social behavior.

Accommodation: None.

Response B: See Commenter #4, Response D.

Commenter #11:

Comment A: Commenter states that although it is better for staff if they are encouraged not to smoke, it is not fair to apply the same rules to staff that are being applied to inmates regarding both use and possession of tobacco products.

Accommodation: None.

Response A: See Commenter #4, Response D.

Commenter #12:

Comment A: Commenter states that 90 percent of smokers who try to quit will fail within several days and start smoking again. Mental health patients will have particular difficulty in quitting smoking.

Accommodation: None.

Response A: The Department acknowledges that smoking cessation is a difficult process. As such the Department was very proactive in working collaboratively with a variety of agencies to develop a variety of programs designed to provide for many months before the actual ban became effective. The Department has been well aware that a truly effective cessation program must incorporate education as to dietary changes, exercise, and stress management. See also Commenter #1, Response A, and Commenter #2, Response A.